tenant to pay the rent in arrears with interest and costs.[18] Where the forfeiture is for a cause other than the non-payment of money, equity is not so likely to set it aside in the absence of fraud, accident or mistake;[19] but whenever the parties can be put *in statu quo* by the mere payment of money, it seems that there are few cases in which the court will refuse relief.[20]

AVOIDANCE OF INSANE PERSONS' CONVEYANCES.—The voidable conveyance of an insane person may be disaffirmed,[1] and the property regained by his guardian or committee, or after a return to sanity by himself, or after his death by his personal representative or heirs;[2] and this right may even be exercised against *bona fide* purchasers from the grantee.[3] As to the method which should be employed to avoid the conveyance, however, there is a conflict of authority. In the recent case of *Walton* v. *Malcolm* (Ill. 1914) 106 N. E. 211, it was held that the heirs of a grantor alleged to have been insane at the time of making a conveyance, could not give evidence of such insanity in an action of ejectment brought by them against the heirs of the grantee to recover possession of the land.[4] It is axiomatic that legal title alone can support an action of ejectment,[5] and since the deed is merely voidable, it is said to pass the legal title and be avoidable only upon equitable grounds.[6] Nevertheless, in most jurisdictions, a grantor, insane at

[18]See Horton *v.* New York & H. R. R. R. (1883) 12 Abb. N. C. 30, affd. 102 N. Y. 697.

[19]Gordon *v.* Richardson (1904) 185 Mass. 492; see Sheets *v.* Sheldon (1868) 7 Wall. 416; Kann *v.* King (1907) 204 U. S. 43.

[20]It is said that equity will grant relief even where the tenant's default is wilful. See Mactier *v.* Osborn (1888) 146 Mass. 399. In fact, the tenant is so favored, that in the principal case it might still not be too late for him to seek relief, for even in States where courts of law and equity are united, and a defendant is required to set up by answer any equitable defense or right to affirmative relief which he may have, it is held that the tenant does not lose his right to an injunction by failing to set it up against the landlord's action for possession. Giles *v.* Austin (1875) 62 N. Y. 486.

[1]As to what contracts and conveyances are voidable, see 14 Columbia Law Rev. 674.

[2]1 Devlin, Real Estate (3rd ed.) § 75.

[3]Hovey *v.* Hobson (1867) 53 Me. 451; Dewey *v.* Allgire (1893) 37 Neb. 6; *contra,* Odom *v.* Riddick (1889) 104 N. C. 515. Most courts make a return of the consideration a condition precedent to avoidance, on the ground that it is inequitable to take land from an innocent grantee unless he can be put *in statu quo.* 1 Devlin, Real Estate (3rd ed.) § 76. Others, on the contrary, hold that to require restitution would be to withdraw the very protection which the law seeks to afford. Gibson *v.* Soper (Mass. 1856) 6 Gray 279; see Hovey *v.* Hobson, *supra.*

[4]The following cases support this view: Moran *v.* Moran (1895) 106 Mich. 8; McAnaw *v.* Clark (1902) 167 Mo. 443.

[5]Shipman, Common Law Pleading, 123; Fenn *v.* Holme (1859) 62 U. S. 481, 483.

[6]Warvelle, Ejectment, § 334. The right of the insane person to recover his property can hardly be said to be equitable only, since the right of recovery exists even against *bona fide* purchasers for value. See note 2, *supra.*

the time of conveyance, is allowed to maintain an action of ejectment to recover his property and to give evidence of his insanity to avoid his deed.[7] The courts, in such jurisdictions, usually attempt to draw an analogy with the cases where a defrauded grantor is permitted to bring ejectment,[8] or where an infant, after becoming of age, is permitted to bring an action of ejectment to avoid his conveyance made during infancy.[9]

There is no difficulty on principle in allowing an insane person to bring an action of ejectment to avoid his conveyance, but the logical solution is to be found in a consideration of what effects a transfer of title, rather than in an endeavor to create an exception to the rule that ejectment can be brought only upon a legal title. It was a recognized principle of the common law that an estate of freehold could not begin nor end without ceremony;[10] a re-entry being considered of sufficient solemnity to revest title in the grantor of a conditional estate for condition broken,[11] and in the same way, an infant after becoming of age, regained property he had conveyed away.[12] The usual reason given why a lunatic upon becoming sane could not do this was that a man will not be permitted to stultify himself.[13] Once having overthrown this limitation, and having given a lunatic the right personally to avoid his conveyances, then he stands on the same footing with the grantors whose conveyances the law said were voidable for infancy,[14] or for condition broken.

The use of deeds in conveyancing in place of the old method of feoffment by livery of seisin, has not changed the principle of the law as to the vesting or devesting of estates, either in the case of the recovery of an estate for condition broken, or in the recovery of property conveyed away during infancy,[15] or lunacy.[16] The strict rule of the common law has, however, been relaxed, so that bringing an

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[7] 1 Devlin, Real Estate (3rd ed.) § 73a. It should be noted, that in some cases cited to sustain this position, the propriety of bringing ejectment to recover property conveyed under a voidable title is not in issue, since some courts hold the deed void, Farley *v.* Parker (1876) 6 Ore. 105, or the case arises under a code. Phillips *v.* Gorham (1858) 17 N. Y. 270. Although Smith *v.* Ryan, *infra,* was decided in a code State, the complaint alleged only a cause of action at law, and it was tried on that basis.

[8] See Smith *v.* Ryan (1908) 191 N. Y. 452. Starting out with the proposition that an insane person's deed is voidable, cases in which a defrauded grantor is allowed to bring ejectment are not in point, since to maintain such an action there must have been fraud in the inception of the deed, in which case it is not voidable but a nullity. See Warvelle, Ejectment, § 254.

[9] See Hovey *v.* Hobson, *supra.*

[10] Co. Lit., 214b, (2).

[11] 4 Kent, Comm., *127.

[12] 2 Reeves, Real Property, 1444. One having the right of entry may bring ejectment. Shipman, Common Law Pleading, 122.

[13] See 4 Columbia Law Rev. 433.

[14] Whether or not there was any justification for the analogy drawn between infants' and lunatics' conveyances, both are to-day voidable, and it is submitted, therefore, that the procedure as to avoidance should be the same.

[15] See Touch *v.* Parsons (1765) 3 Burr. 1794.

[16] See Allis *v.* Billings (Mass. 1843) 6 Metc. 415.

action of ejectment is a sufficient act of disaffirmance in the case of a recovery for condition broken,[17] while in the case of infancy all that is necessary to give the grantor the right to possession is some overt act of disaffirmance such as a subsequent deed to a third person, or an action to set aside the deed or to recover possession of the premises.[18] Since, therefore, there has been this modification in the case of other conveyances which at law are held to be voidable, there seems to be no reason for not applying the same rule to lunatics' voidable conveyances and allowing an action of ejectment; the bringing of the action to serve the double purpose of revesting title and recovering possession.[19]

VESTING OF UNREGULATED DISCRETION IN OFFICERS BY ORDINANCE.—The first prerequisite to the validity of any ordinance is that the municipality confine itself to the powers set forth in its charter of incorporation. This question comes up in cases where the municipality, under its general powers to declare and regulate nuisances, forbids the doing of certain acts without the consent of an officer, for if it has no power over the particular subject matter, the vesting of an uncontrolled discretion in an administrative agent to act in respect to it is of itself regulation and clearly invalid. The power of the municipality is restricted to declaring that a nuisance which is a nuisance *per se*, or which, under the circumstances, is in fact so, and the court has the final voice as to what constitutes a nuisance.[1] In the recent case of *Ex parte Broussard* (Tex. 1914) 169 S. W. 660, an ordinance making it unlawful to maintain stock pens including more than six heads of cattle within 300 feet of any residence or hotel without a permit from the city council, was held, one judge dissenting, to be within the powers of the municipality and valid. It is obvious that stock pens when maintained in cities or populated sections may become nuisances and so subject to regulation as such.[2]

But the objection was urged that the ordinance was void because it vested an uncontrolled and arbitrary discretion in the administrative agents. Similar ordinances have been declared void on the ground that they are unreasonable,[3] and this without any apparent recourse to constitutional objections. The reasoning of the courts in many instances proceeds upon the theory that an ordinance which places within the arbitrary discretion of an individual, or set of individuals, the power to prohibit acts not of such a nature as to justify prohibition, is an unreasonable exercise of the municipal function.[4] But where

[17]1 Tiffany, Real Property, § 74; *cf.* note on "Enforcement of Forfeiture Conditions in Leases for Years", at p. 58, *supra*.

[18]2 Reeves, Real Property, 1444.

[19]See 2 Reeves, Real Property, 1445.

[1]McQuillin, Municipal Ordinances, §§ 441, 442; see Laugel *v.* City of Bushnell (1902) 197 Ill. 20.

[2]Joyce, Law of Nuisances, §§ 208, 209. In Hagerstown *v.* Baltimore & O. R. R. (1908) 107 Md. 178, a case somewhat similar to the main case, the court intimated that stockyards were not nuisances *per se*. The fact that the ordinance worked oppressively in this particular instance, seems to have been largely responsible for the dictum.

[3]See 2 Dillon, Municipal Corporations (5th ed.) § 598.

[4]Matter of Frazee (1886) 63 Mich. 396; City of Chicago *v.* Trotter (1891) 136 Ill. 430.